SHABLY AHMAD

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CRIMINAL APPEAL NO. 52-19-88]
13 APRIL 1992

CRIMINAL PROCEDURE: *Cheating - Property acquired by trick or other means of false representation - Appropriation of monies by deception - No trust created.*

CRIMINAL PROCEDURE: *Charge - Alteration of charge - Joinder of charges ss. 153(2), 164 Criminal Procedure Code (FMS Cap 6) - Conviction - Whether substitution of conviction possible.*

The appellant (accused) was charged in the Sessions Court, Alor Setar for an offence of criminal breach of trust by a public servant under s. 409 of the Penal Code.

The accused was found guilty and sentenced to 18 months imprisonment.

On appeal, Counsel for the appellant argued that the evidence adduced in the case did not disclose an offence of criminal breach of trust but one of cheating.

The learned DPP conceded that that was so but later urged the Court to substitute a conviction for the offence of cheating for the conviction on the offence of criminal breach of trust.

Counsel for the appellant however argued that the Court should not alter the charge.

Held:

[1] Once a property is acquired by trick or by other means of false representation there is an offence of cheating under s. 420 of the Penal Code. Thus, the offender is said to have committed the offence of criminal breach of trust as there was no trust created by the owner of that property.

[2] The charge against the accused for criminal breach of trust cannot be altered to that of cheating as the charge in the former was one single charge involving a total sum comprising 7 amounts for 7 transactions within 1 year. This charge is allowed under s. 153(ii) of the Criminal Procedure Code.

[3] In this case, the evidence disclosed transactions within 12 months. The Court cannot alter the single charge of criminal breach of trust to 7 charges of cheating as this is not allowed within the ambit of s. 164 of the Criminal Procedure Code.

[Appeal allowed. Conviction set aside. Retrial order.]

Cases referred to:
Mc Iver [1935] 69 MLJ 681 ***(cit)***
State v. Radhakanta Patnaik [1954] Criminal LJ 1429 ***(cit)***
Emperor v. J Mac Iver & Anor. [1936] AIR 1 ***(cit)***
Sivalingam v. PP [1982] CLJ (Rep) 330 ***(cit)***
Gurdit Singh v. PP [1983] CLJ (Rep) 575 ***(cit)***

Legislation referred to:
Criminal Procedure Code, ss. 153(ii), 164
Penal Code, ss. 409, 420

Other source referred to:
Ratanlal's Law of Crimes, Vol. 2, 23rd Edn., p. 1528

For the appellant - A.K. Lee; M/s. A.K. Lee & Co.
For the public prosecutor - Ahmad Rusli

JUDGMENT

KC Vohrah J:

The appellant (the accused) was charged in the Sessions Court Alor Setar for an offence of criminal breach of trust by a public servant under s. 409 of the Penal Code under the following terms:

> That you between 30 January 1985 and 23 July 1985 at Sekolah Kebangsaan Alor Mengkudu, Alor Setar being a public servant, namely Guru Besar, Sekolah Kebangsaan Alor Mengkudu, Alor Setar and in such capacity entrusted with certain property, to wit, a sum of $7,835 being the salaries of one Hj. Ahmad bin Hj. Ibrahim for the months from January to July 1985, committed criminal breach of trust in respect of the said property, and that you thereby committed an offence punishable under s. 409 of the Penal Code.

At the close of the defence, the accused was found guilty and sentenced to 18 months imprisonment.

For sometime before and during the relevant period specified in the charge the accused was headmaster of Sekolah Kebangsaan Alor Mengkudu, Alor Setar. One Hj. Ahmad bin Hj. Ibrahim was a teacher at the school from January 1984 till his admission to hospital in April 1984 for an illness. Since the said teacher was a sickly man he decided in June 1984 to exercise his option to retire early on 1 January 1985. He therefore put in an application to the relevant authority. The application was handed over to the accused who as headmaster had to forward it with his recommendation through the Director of Education in Kedah to the relevant authority. Although the accused told Haji Ahmad's wife that he had forwarded the application, the teacher never received any reply to his application. The Education Department in fact never received it. The teacher was worried and in December 1984 he wrote in to the Director of Education of Kedah to apply for no pay leave effective from 1 January 1985 until the date his application for optional retirement was approved. His application was handed over to the accused who promised to forward it to the Education Department. This application too did not reach the department.

Haji Ahmad did not go back to the school on 1 January 1985. Although he received no reply from the Education Department he assumed his application for no pay leave had been approved. He checked his account at a financial institution where his monthly salaries had previously been credited and he found that the January 1985 salary was not credited. No salaries were credited for the months of January to July 1985.

The accused as headmaster of the school was authorised to sign and he signed all the monthly pay sheets for the staff of the school which were sent to the Kedah branch office of the Accountant General for payment. For the months of January to July 1985 the name of Haji Ahmad was included in the paysheets for salaries to be paid to him, although he was absent from his duty at school for the same period. In all the paysheets from January to July 1985 the accused certified that all persons named in the paysheet, without exception, had been working in the school.

For all the 7 months, the Accountant General's office, placing reliance on the said paysheets issued cheques to the headmaster for each of the said months for the total amount shown in the monthly paysheet. The 7 cheques were paid into an account maintained by the school

at the Alor Setar Branch of Malayan Banking. For each of the 7 months a cheque was issued by the school against this account in the name of Haji Ahmad and the accused cashed the cheques and appropriated altogether a total sum of $7,835 to himself.

In the appeal before me Counsel for the appellant save the evidence adduced in the case did not disclose an offence of criminal breach of trust but one of cheating. The learned Deputy Public Prosecutor conceded that that was so. I agree except that I say that the facts disclose not just one offence of cheating but seven.

The case of *Mc Iver*, an Indian case, [1935] 69 MLJ 681 quoted at *Ratanlal's Law of Crimes*, Vol. 2 (23rd Edn.) at p. 1528 probably guided the officer who framed the charge of criminal breach of trust against the accused and the Judge of the Sessions Court who convicted the accused on it. According to the authors of Ratanlal, in that case, the accused falsely represented to the complainant that they had sent some bonds for rectification to Bombay and as they had not arrived and the last day for completion of a contract with a bank had arrived, requested the complainant to oblige them by giving the complainant's bonds temporarily for a few days, assuring him that his bonds would be returned to him as soon as the bonds sent for rectification were received and the complainant endorsed and delivered to the accused the bonds for this purpose. According to the authors of Ratanlal it was held that the bonds were not handed over absolutely to the accused but were entrusted to them; even though the accused when they induced the complainant to part with certain properties had the intention of deceiving him, a subsequent misappropriation by them of the property to their use would amount to criminal breach of trust; the fact that there was a complete offence of cheating would not prevent the accused being guilty of the offence of criminal breach of trust.

What I have just set out as coming from Ratanlal does not take into account a much later case, the case of *State v. Radhakanta Patnaik* [1954] Criminal LJ 1429 where at 1432 the history of the case of *Emperor v. J Mc Iver & Anor. AIR* [1936] 1 is dealt with. In view of the fact that there is some confusion caused by the case of *Mc Iver* I think it best that that portion of the judgment of Mohanty J which deals with the history of the case is set out:

> In that case, the accused was prosecuted under ss. 420 and 409, I.P.C. before the Magistrate. The facts of that case as stated in that judgment clearly disclose the case of cheating. During the pendency of the criminal case before the Magistrate, both the complainant and the accused compounded the case. The charge under s. 420 is a compoundable one with the permission of the Magistrate, whereas a charge under s. 409 I.P.C. is not so. The Magistrate on receipt of the compromised petition gave permission to compound charge under s. 420 and acquitted the accused of both the charges, stating in the order that the facts disclosed in the prosecution case, amounted really to an offence under s. 420; and that there can be no case of criminal breach of trust when the property acquired by the complainant was by cheating.
>
> Against that order, the Government preferred an appeal before the High Court. A division bench of the High Court took the view that both the charges can be sustainable in one criminal case; and therefore they set aside the order under s. 409 and sent back the case to the trying Magistrate for retrial, under s. 409, I.P.C. During the retrial, a question arose before the Magistrate on the plea of the accused as to whether the accused can legally take up the plea of *autrefois* for his prosecution under s. 409, when he has already been acquitted of the charge under s. 420, I.P.C. The Magistrate, while taking a different view, negatived that plea on the ground that he is bound by the order of the High Court. Against that order, the accused went up to the High Court in revision, but the single Judge before whom the revision petition came, passed an order saying that he does not like to interfere in revision with the order of the Magistrate. The accused was then convicted; and against his conviction, he again preferred an appeal to the High Court; and the questions about his plea of *autrefois* and also about his conviction under s. 409 were referred to a Full Bench.

> In that Full Bench, the majority of the Judges were of the opinion that both the charges under ss. 420 and 409 cannot be sustainable as they are mutualy exclusive, and that the property acquired by trick cannot be the subject-matter of a trust so as to bring the offender under s. 409, I.P.C. for the appropriation of that property to his own use. The minority view expressed by Laxmana Rao J is to the effect that the offence of cheating becomes complete as soon as the offender procures the property by deception, and that when he appropriates that amount to his own use he commits an offence of criminal breach of trust punishable under s. 409, I.P.C. He, therefore, maintained the conviction under s. 409 even though the offence as disclosed comes under s. 420.

Mohanty J agrees with the majority view of the Judges in *Mc Iver* and states at p. 1433:

> In my view, the view taken by the majority Judges is the correct view. The word "entrustment" or "entrusted" though used in s. 405, I.P.C. is not defined in the I.P.C. The word itself conveys and includes that the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship as between them. That confidence cannot arise when the property was acquired by the offender by some trick. Such a trick prevents any true consent arising. If the property is obtained by trick, or by any other unlawful means, then there cannot be any entrustment. "Entrustment" means the handing over of the property by lawful means.

I respectfully agree with the above view of Mohanty J for the reasons that he gives as indeed I agree with him that once property is acquired by trick or by other means of false representation there is an offence of cheating under s. 420 of the Penal Code and if the offender appropriates that amount to his own use, he cannot be said to have committed the offence of criminal breach of trust because in that case there was practically no trust created by the owner of the property.

As I have stated earlier while the evidence does disclose appropriation of monies by the accused to his own use the fact remains that he obtained the moneys through deception of the relevant paying authority and the offence is not one of criminal breach of trust. There are in fact several offences of cheating. I must therefore allow the appeal of the accused.

I have been urged by the learned Deputy Public Prosecutor to substitute a conviction for the offence of cheating for the conviction on the offence of criminal breach of trust. He relies on the cases of *Sivalingam v. PP* [1982] CLJ (Rep) 330 and *Gurdit Singh v. PP* [1983] CLJ (Rep) 575 and argues that I should make the substitution. Counsel for the accused relies on the same cases to say I should not alter the charge. In my view there is a fundamental reason why I cannot alter the charge. The charge against the accused for criminal breach of trust was one single charge against the accused involving a total sum comprising seven months for seven transactions within 1 year and it is a charge allowed by s. 153(ii) of the Criminal Procedure Code. However, s. 164 of the Code provides that when a person is accused of more offences than one of the same kind committed with the space of twelve months for the first to the last offence he may be charged with and tried at one trial for any number of them not exceeding three. In the case of the accused the evidence disclosed transactions within 12 months and it is clear I cannot alter the single charge of criminal breach of trust to 7 charges of cheating.

I therefore allow the appeal of the accused and set aside the conviction under s. 409 of the Penal Code and order a retrial of the accused on charges of cheating in accordance with the procedure set out in s. 164 of the Criminal Procedure Code.

Also found [1992] 2 CLJ 1269